Supreme Court, U.S.
FILED
MAY 20 1994
OFFICE OF THE CLERK

No. 93-1437

In The

Supreme Court of the United States

October Term, 1993

GILFORD PARTNERS,

Petitioners,

v.

RICHARD PIZITZ, et al.,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Alabama

RESPONDENTS' BRIEF IN OPPOSITION

LEE H. ZELL
Counsel of Record
SUSAN S. WAGNER
BERKOWITZ, LEFKOVITS, ISOM & KUSHNER
A Professional Corporation
1600 SouthTrust Tower
Birmingham, Alabama 35203
(205) 328-0480

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Whether the courts of Alabama have personal jurisdiction over a nonresident defendant who, through the use of interstate mail and wire communications, (a) knowingly and voluntarily sells an unregistered security in Alabama in violation of state law and (b) in connection with the sale, makes misrepresentations in written materials mailed to Alabama residents.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS WHY THE WRIT SHOULD BE DENIED .. 3

I. GILFORD WAS SUBJECT TO PERSONAL JURISDICTION IN ALABAMA UNDER ESTABLISHED PRINCIPLES OF THIS COURT 3

II. GILFORD WAS SUBJECT TO PERSONAL JURISDICTION IN ALABAMA WITHOUT REGARD TO ANY STATUTORY "LEGAL FICTION" 10

III. THE DECISION OF THE ALABAMA SUPREME COURT DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT, ANY UNITED STATES COURT OF APPEALS, OR ANY OTHER STATE COURT OF LAST RESORT 12

CONCLUSION 15

TABLE OF AUTHORITIES

Page

Alabama Waterproofing Co. v. Hanby, 431 So. 2d 141 (Ala. 1983) 11, 13

Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987) 7, 8

Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985) 5, 6, 8, 9, 11, 12

Calder v. Jones, 465 U.S. 783 (1984) 5, 6, 8, 14

Erlanger Mill v. Cohoes Fibre Mills, 239 F.2d 502 (4th Cir. 1956) 14

Florendo v. Pan Hemisphere Transp., Inc., 419 F. Supp. 16 (N.D. Ill. 1976) 6, 7, 8, 13

Gordon v. Tow, 498 N.E.2d 718 (Ill. App. Ct. 1986) 12, 13, 14

Grand Entertainment Group, Ltd. v. Star Media Sales, Inc., 988 F.2d 476 (3d Cir. 1993) 12

Hoopeston Canning Co. v. Cullen, 318 U.S. 313 (1943) 11

International Shoe Co. v. Washington, 326 U.S. 310 (1945) 11

Jonnet v. Dollar Sav. Bank, 530 F.2d 1123 (3rd Cir. 1976) 14

Pittsburgh Terminal Corp. v. Mid Allegheny Corp., 831 F.2d 522 (4th Cir. 1987) 14

Sea Lift, Inc. v. Refinadora Costarricense, 792 F.2d 989 (11th Cir. 1986) 14

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) 9

STATEMENT OF THE CASE

Respondents, Richard Pizitz ("Pizitz"), Richard Pizitz, Jr., Merritt L. Pizitz, Jill Pizitz, and Susan Pizitz Bosshard, three of whom are Alabama residents, are partners in Pizitz Family Investment Partnership IX, an Alabama general partnership (the "Pizitz Partnership"). In May 1990, the Pizitz Partnership purchased a limited partnership interest in petitioner Gilford Partners ("Gilford") for the sum of $545,880. (Pizitz depo. at 41, R. 40).[1] The limited partnership interest was not, either at the time of its sale to the Pizitz Partnership or at any other time, registered under the Alabama Securities Act. (R. 108). As of March 31, 1991, the interest purchased by the Pizitz Partnership was liquidated for the sum of $179,320.

Respondents filed a complaint against Gilford and others,[2] based on their failure to register the Gilford limited partnership interest in violation of the Alabama Securities Act,[3] misrepresentations and omissions in violation of Ala. Code § 8-6-17 (1984) and § 12(2) of the Securities Act of 1933, 15 U.S.C. § 77l(2), common law fraud, and breach of fiduciary duty. (R. 1-7). Gilford and

---

[1] Record references are to the record on appeal to the Supreme Court of Alabama.

[2] The other defendants in the action are Holmes-Gilbrooke General Partners, H. Robert Holmes ("Holmes"), and Gilbrooke Associates, Inc. Holmes-Gilbrooke General Partners is the general partner of Gilford; Holmes and Gilbrooke Associates, Inc. are Holmes-Gilbrooke's general partners.

[3] Ala. Code § 8-6-4 (1984) makes it unlawful for any person to offer or sell any security in Alabama unless it is registered under the Alabama Securities Act or unless the security or sale is exempt from registration.

the other defendants filed a motion to dismiss the complaint, asserting lack of personal jurisdiction. (R. 9). The trial court thereafter granted respondents' motion for summary judgment – opposed by Gilford on the ground that its sale of the limited partnership interest to the Pizitz Partnership was exempt from registration under the Alabama Securities Act – and directed the entry of a final judgment pursuant to Ala. R. Civ. P. 54(b).[4] This order was affirmed on appeal to the Supreme Court of Alabama.

Although the first communication between the Pizitz Partnership and a representative of Gilford was initiated by Pizitz, Gilford voluntarily and purposefully engaged in conduct directed toward the State of Alabama in connection with the sale of the limited partnership interest at issue here. Specifically, Gilford mailed a number of documents to Pizitz at his office in Birmingham, Alabama, including a Confidential Private Placement Memorandum (which contained factual misrepresentations for which respondents sought relief in this action); newspaper articles concerning the investment activities and strategies of Holmes, one of Gilford's principals; a subscription agreement for execution in Alabama by the Pizitz Partnership; the fully executed subscription agreement; the Gilford limited partnership agreement; amendments to the Gilford limited partnership agreement; monthly updates of

---

[4] By agreement of the parties, the trial court reserved ruling on respondents' motion for summary judgment with respect to defendants other than Gilford. (R. 292). Respondents' claims for fraud and breach of fiduciary duty also were left pending. (R. 303).

Gilford's performance; and statements of changes in the Pizitz Partnership's capital account in Gilford. (R. 37-39). In addition, Pizitz and Holmes spoke by telephone on several occasions before and after the Pizitz Partnership's investment in Gilford. Pizitz participated in each of these conversations from his office in Birmingham. (R. 38).[5]

Even more to the point, however, Gilford's voluntary and purposeful activities directed to the State of Alabama were part of a successful effort to sell an unregistered security to the Pizitz Partnership in violation of the Alabama Securities Act. Regardless of who made the first contact, Gilford could have declined to respond to Pizitz's initial inquiry or to furnish information to him, and certainly could have refused to finalize the sale. Its decision to sell the security to the Pizitz Partnership in violation of Alabama law was voluntary and intentional.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

GILFORD WAS SUBJECT TO PERSONAL JURISDICTION IN ALABAMA UNDER ESTABLISHED PRINCIPLES OF THIS COURT

Gilford seeks a writ of certiorari on the issue of whether its sale of an unregistered security in Alabama in violation of state securities laws satisfied the "minimum

[5] The Petition fails to mention any of these contacts with the forum state.

contacts" requirement of Alabama's long-arm statute,[6] such that an action against Gilford to enforce the laws of Alabama properly could be maintained in an Alabama court. Gilford argues that it is not subject to personal jurisdiction in Alabama because (a) the mere execution of a contract in the forum state does not confer personal jurisdiction over a nonresident defendant, and (b) the agreement to sell the security at issue was in any event executed in Illinois, not Alabama, since it was subject to

---

[6] Alabama's long-arm statute provides for out-of-state service to the extent permitted by the due process clause of the United States constitution:

> (a) *Basis for out-of-state service.*
>
> * * *
>
> (2) SUFFICIENT CONTACTS. A person has sufficient contacts with the state when that person, acting directly or by agent, is or may be legally responsible as a consequence of that person's:
>
> (A) Transacting any business in this state;
>
> * * *
>
> (C) Causing tortious injury or damage by an act or omission in this state. . . .
>
> * * *
>
> (I) Otherwise having some minimum contacts with this state and, under the circumstances, it is fair and reasonable to require the person to come to this state to defend an action. The minimum contacts referred to in this subdivision (I) shall be deemed sufficient, notwithstanding a failure to satisfy the requirement of subdivisions (A)-(H) of this subsection (2), so long as the prosecution of the action against a person in this state is not inconsistent with the Constitution of this state or the Constitution of the United States.

Ala. R. Civ. P. 4.2.

"acceptance" by Gilford in Illinois. Of course, the basis of personal jurisdiction in this case was not the mere execution of a contract, but rather the fact that Gilford voluntarily sold an unregistered security to Alabama residents – in short, that its contacts with the State of Alabama violated Alabama law, with foreseeable injury to residents of the state.

In *Calder v. Jones*, 465 U.S. 783 (1984), this Court adopted an "effects" test that allows the assertion of personal jurisdiction for a nonresident defendant's "intentional, and allegedly tortious, actions . . . expressly aimed at [the forum state]," made with knowledge that the injury will be felt by the plaintiff in the forum state. 465 U.S. at 789-90. The Court made a sharp distinction between such intentional torts and the "mere untargeted negligence," present in cases relying on the "stream of commerce" test for personal jurisdiction, 465 U.S. at 789, and concluded:

> An individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California.

465 U.S. at 790. In *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), the Court cited *Calder*, among other cases, for the following propositions:

> So long as a commercial actor's efforts are "purposely directed" toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there. . . .
>
> [Considerations of] "the burden on the defendant," "the forum State's interest in adjudicating

> the dispute," "the plaintiff's interest in obtaining convenient and effective relief," "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and the "shared interest of the several States in furthering fundamental substantive social policies" . . . sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required.

471 U.S. at 476-77 (citations omitted).

In finding that Gilford's contacts with Alabama were sufficient to confer personal jurisdiction, the Alabama Supreme Court adopted the reasoning of *Florendo v. Pan Hemisphere Transp., Inc.*, 419 F. Supp. 16 (N.D. Ill. 1976). Although *Florendo* predates *Calder*, it is based on precisely the same reasoning.

As in the present case, the *Florendo* court determined that nonresident defendants were subject to personal jurisdiction in Illinois for the sale of an unregistered security in that state. The court found it unnecessary to reach the issue of whether the defendants were "transacting business" in Illinois, holding instead that the failure to register the security under the Illinois securities statute was "[t]he commission of a tortious act [in Illinois]," within the meaning of an alternative provision of the long-arm statute. The court reasoned that (a) the definition of "tortious act" was not limited to "those acts which constituted torts at common law," but included duties imposed by statute, such as the duty to register securities imposed by state securities laws, 419 F. Supp. at 17-18;

and (b) the situs of the tort was Illinois because the injury occurred in Illinois, 419 F. Supp. at 18.

The *Florendo* court also concluded that requiring the defendants to litigate in Illinois would not violate due process – that is, that the "minimum contacts" requirement was met:

> One test of fairness is whether the possibility of being sued in the forum was foreseeable. . . .
>
> In this case, the possibility of being sued in Illinois was even more foreseeable than it was for the defendants in [various products liability cases applying the "stream of commerce" test for personal jurisdiction]. There the defendants merely released a product into nationwide channels of commerce and could contemplate that it might ultimately be bought by a purchaser in some other state. Here defendants sold an interest in a limited partnership to a specifically identified purchaser residing in Illinois.
>
> Another test of fairness is whether defendants invoked the benefits and protections of the laws of Illinois. Defendants availed themselves of the privilege of selling a security to an Illinois resident. It is certainly fair under the circumstances to require them to litigate a controversy concerning that sale in Illinois.

419 F. Supp. at 19.

Gilford argues that "[t]he theoretical foundation of *Florendo* has been clearly repudiated by this Court [because] [t]he *Florendo* court applied a version of the "stream of commerce" test which was decried by the Court in *Asahi Metal [Indus. Co. v. Superior Court*, 480 U.S.

102, 112 (1987).]" Gilford's reference, however, is to section II A of Justice O'Connor's opinion in *Asahi*, which five justices of the Court expressly refused to endorse. Moreover, the *Florendo* court did not rely on the "stream of commerce" test, but, like this Court in *Calder*, simply noted that the purposeful direction of a tort at a citizen of the forum state provides a stronger basis for personal jurisdiction than that found in "stream of commerce" cases. Consequently, not only the "theoretical foundation," but also the rationale of *Florendo* remains sound.

In addition to the factors considered in *Calder* and *Florendo*, Gilford had mail and telephone contacts with the Pizitz Partnership which were not "random," "fortuitous," or "attenuated." *Burger King, supra*, 471 U.S. at 475. As the Court stated in *Burger King*:

> Jurisdiction . . . may not be avoided merely because the defendant did not *physically* enter the forum State. . . . [I]t is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted.

471 U.S. at 476. Gilford's mail and phone contacts in this case were purposely designed to consummate the sale of an unregistered security in the State of Alabama for a price in excess of $500,000. Under *Burger King*, the Court also properly should consider Alabama's "manifest interest" not only in "providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors," 471 U.S. at 473, but also in providing a forum for enforcement of its securities laws.

Finally, particularly in light of the amount at issue, the defense of this action in Alabama has imposed no undue burden on Gilford. No representative of Gilford was required to appear personally in the state in connection with discovery or any court proceeding. As the Court recognized in *Burger King*, "because 'modern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity,' it usually will not be unfair to subject him to the burdens of litigating in another forum for disputes relating to such activity. . . . " 471 U.S. at 474 (citation omitted).

In essence, while conceding that Alabama validly may impose registration requirements governing the sale of securities to its citizens, Gilford argues that this Court should not permit enforcement of those requirements by Alabama courts. In a highly regulated field such as the sale of securities, an issuer such as Gilford not only should know that registration may be required, but also "should reasonably anticipate being haled into court," *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980), in any state in which it intentionally sells securities – whether by telephone, mail, or in person – without satisfying the state registration requirements. Because statutory securities regulation provisions and the states' efforts to enforce them through the exercise of long-arm jurisdiction are reasonably foreseeable, the "fair warning" requirement of due process plainly was met here. *Burger King, supra*, 471 U.S. at 472-74.

II.

GILFORD WAS SUBJECT TO PERSONAL JURISDICTION IN ALABAMA WITHOUT REGARD TO ANY STATUTORY "LEGAL FICTION"

Ignoring virtually all of the factors discussed in Part I of the Brief, Gilford insists that personal jurisdiction in this case was based solely on a "legal fiction." Gilford argues that because it mailed an unsigned subscription agreement to Pizitz in Alabama, reserving the right of final "approval" in Illinois, the sale of the limited partnership interest technically occurred in Illinois. Thus it argues that Ala. Code § 8-6-12 (1984), which defines where the offer and acceptance of a securities sale occur, creates a "legal fiction," which cannot serve as the basis for personal jurisdiction.

The Alabama Supreme Court unquestionably relied on Ala. Code § 8-6-12 (1984) in determining that the sale of the Gilford limited partnership interest occurred in Alabama. This determination was not, however, necessary to the personal jurisdiction analysis. The court's purpose in citing this section was to demonstrate that Gilford's conduct met one of the specific bases for personal jurisdiction set forth in Alabama's long-arm statute, that of "[c]ausing tortious injury or damage by an act or omission *in this state.*" Ala. R. Civ. P. 4.2(a)(2)(C) (emphasis supplied). Reliance on § 8-6-12 is not necessary to satisfy the more general "minimum contacts" provision for personal jurisdiction set forth in Ala. R. Civ. P. 4.2(a)(2)(I),[7] which "is as broad as the permissible limits

---

[7] *See* n.6, *supra*.

of due process." *Alabama Waterproofing Co. v. Hanby*, 431 So. 2d 141, 145 (Ala. 1983). The due process requirement is satisfied, not by any "legal fiction" regarding where the sale occurred, but by Gilford's voluntary and purposeful sale of an unregistered security to Alabama residents in violation of Alabama securities laws.[8]

In any event, the question of where a contract technically is executed for conflict of laws purposes never is controlling in the determination of personal jurisdiction:

> If the question is whether an individual's contract with an out-of-state party *alone* can automatically establish sufficient minimum contacts in the other party's home forum, we believe the answer clearly is that it cannot. The Court long ago rejected the notion that personal jurisdiction might turn on "mechanical" tests, *International Shoe Co. v. Washington*, [326 U.S. 310, 319 (1945)], or on "conceptualistic . . . theories of the place of contracting or of performance," *Hoopeston Canning Co. v. Cullen*, [318 U.S. 313, 316 (1943)].

Burger King, 471 U.S. at 478. Instead, the factors of "prior negotiations and contemplated future consequences,

---

[8] Of course, Gilford might have argued that, but for the "legal fiction" established by Ala. Code § 8-6-12 (1984), the sale would not have been unlawful. Gilford challenged only Alabama's exercise of personal jurisdiction, however, not the validity – on constitutional or other grounds – of Alabama's imposition of liability for failure to register the limited partnership interest. Indeed, Gilford's defense to liability was premised solely on its argument that the interest was exempt from the registration requirements of the Alabama Securities Act. Consequently, the Court must assume that Gilford violated a valid statute designed to regulate securities trading with Alabama citizens.

along with the terms of the contract and the parties' actual course of dealing," are to be evaluated in determining whether the defendant purposefully established minimum contacts within the forum. 471 U.S. 479. Accordingly, although a contract alone does not automatically establish personal jurisdiction, mail and telephone communications concerning the formation of the contract – communications that without question occurred here – can satisfy the minimum contacts requirement. *Grand Entertainment Group, Ltd. v. Star Media Sales, Inc.*, 988 F.2d 476, 482 (3d Cir. 1993).

III.

THE DECISION OF THE ALABAMA SUPREME COURT DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT, ANY UNITED STATES COURT OF APPEALS, OR ANY OTHER STATE COURT OF LAST RESORT

Of the cases cited by Gilford, only *Gordon v. Tow*, 498 N.E.2d 718 (Ill. App. Ct. 1986), addresses the issue of personal jurisdiction over a nonresident defendant based on the defendant's violation of the forum state's securities laws.[9] Gilford's description of *Gordon* and its suggestion that the decision conflicts with the lower court decisions in this case, however, simply are misleading. Gilford correctly observes that the *Gordon* court rejected the exercise of personal jurisdiction over a nonresident

---

[9] Although Gilford's citation of *Gordon* is prefaced by "*See e.g.*," suggesting that it is one of several "other state court decisions addressing the same issue" with which the decision below "conflicts," Gilford fails to cite any other such decision.

defendant based on his unlawful sale of unregistered securities in Illinois. What Gilford fails to disclose, however, is that the sole issue in *Gordon* was whether the defendant was "transact[ing] business" in Illinois within the meaning of that state's long-arm statute.[10] Indeed, the *Gordon* court expressly declined to address whether the defendant's conduct might have satisfied the less stringent "minimum contacts" test of due process.[11] Of course, Ala. R. Civ. P. 4.2, unlike the Illinois long-arm statute, has a general "minimum contacts" provision making the statute "as broad as the permissible limits of due process." *Alabama Waterproofing*, 431 So. 2d at 145. Because it is not necessary for a defendant to "transact business" in Alabama to be subject to the jurisdiction of an Alabama court, and because the Alabama courts were not required to and did not conclude that Gilford had done so, Gilford's reliance on *Gordon* is unavailing.

---

[10] The court did not consider the provision of the Illinois statute authorizing jurisdiction over nonresident defendants who cause "tortious injury" within the state, which provision was the basis for the holding in *Florendo, supra*.

[11] The court stated:

> [W]e reject the contention that the sole focus is whether Tow had sufficient "minimum contacts" with Illinois so as to comport with the Fourteenth Amendment's due process limitations on a State's jurisdiction over a nonresident defendant. . . .
>
> The Illinois Supreme Court has stated that the "boundaries or limits under our [long-arm] statute are not to be equated with the 'minimum contacts' test under the due process clause."

498 N.E.2d at 721 (citations omitted).

Other than *Gordon*, the only state or federal circuit court cases on which Gilford relies are breach of contract actions. *Sea Lift, Inc. v. Refinadora Costarricense*, 792 F.2d 989 (11th Cir. 1986); *Erlanger Mill v. Cohoes Fibre Mills*, 239 F.2d 502 (4th Cir. 1956).[12] The "effects" test adopted by this Court in *Calder* of course was not applicable in those cases. Moreover, the dicta in *Erlanger* on which Gilford relies, to the effect that personal jurisdiction in tort and contract cases is decided on the same standards, is contrary to *Calder*.[13]

By relying on breach of contract cases, Gilford simply attempts to obscure the basis of the claims asserted against it: (a) that Gilford sold securities to the Pizitz Partnership in Alabama in violation of Alabama law, and (b) that its written communications directed to Alabama residents were alleged to contain false representations of material fact. If respondents were claiming that Gilford breached a contract to be performed in Illinois, Gilford might not be held to have foreseen the possibility of being sued in Alabama based on its written and oral communications with Pizitz. Gilford reasonably should

---

[12] Although *Jonnet v. Dollar Sav. Bank*, 530 F.2d 1123 (3rd Cir. 1976), also is cited, Gilford relies on a concurring opinion, not the opinion of the court.

[13] Although *Erlanger* has not expressly been overruled, the Fourth Circuit subsequently has recognized that *Calder* "did away with any uncertainty about minimum contacts on a tort theory." *Pittsburgh Terminal Corp. v. Mid Allegheny Corp.*, 831 F.2d 522, 528 n.8 (4th Cir. 1987). Indeed, because the jurisdictional principles that control this case have been settled for some time, it is hardly surprising that Gilford's search for a "conflicting" circuit court case yielded only a decision that predates *Calder* by nearly forty years.

have foreseen, however, that it might be sued in Alabama for misrepresentation or for violation of Alabama securities laws, with injury to Alabama residents.

CONCLUSION

The Petition does not present this Court with any significant conflict between the circuits or state courts of last resort, with fundamental error below, or with any other compelling reason to grant the writ. Consequently, the Petition is due to be denied.

Respectfully submitted this 20th day of May, 1994.

LEE H. ZELL
Counsel of Record
SUSAN S. WAGNER
BERKOWITZ, LEFKOVITS, ISOM
& KUSHNER
A Professional Corporation
1600 SouthTrust Tower
Birmingham, Alabama 35203
(205) 328-0480

Counsel for Respondents